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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1962**

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**No. 720**

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MELVIN DAVIS REES, Jr., *Petitioner*,

*v.*

COMMONWEALTH OF VIRGINIA, *Respondent*.

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## PETITION FOR REHEARING OF DENIAL OF CERTIORARI

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## PETITION FOR REHEARING OF DENIAL OF CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of April 15, 1963, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia in the above-entitled case as prayed for in the petition filed herein on January 4, 1963.

### Reasons for Granting Rehearing and Issuing the Writ

In asserting unlawful search and seizure, petitioner's primary contention is and has been that his father was incompetent to consent to entry of the locked accordion case because it was not his father's case and he had not been given the means of legitimate access thereto. Only secondarily has petitioner raised the question of whether, assuming his father's competency to consent, the consent was validly obtained. In this connection, the petition for certiorari

noted obliquely that such consent was "probably vitiated" by misrepresentation on the part of the F.B.I. agents that they could obtain a valid search warrant in the absence of consent. Pet. at p. 12. Since the filing of the petition, however, decisions have issued both from this Court and from lower federal and state courts which warrant a stronger focus on the problem presented in this case of consent based on police misrepresentation.

The record in this case shows conclusively that the purpose of the F.B.I. search was to find evidence to incriminate petitioner (T. 75, 77) and that the agents were looking for any one of a large number of evidentiary objects connected with various crimes which they suspected petitioner of having committed (T. 74, 94-95). No indication appears in the record of any cause to believe that any specific object was actually in the house, and in fact only one such object was actually found (See T. 83). The most that can be said to establish cause for the search is that petitioner was suspected of crime and was known to have frequented the house in the past. Even this cause, weak as it is, was so remote in time from the search as to be legally insubstantial, for petitioner had been in Memphis, more than 900 miles from the searched premises, for the two and a half months immediately preceding the search (T. 152, 779-80). See *Schoeneman* v. *United States*, No. 17,395, D.C. Cir., Apr. 4, 1963, quoting *Sgro* v. *United States*, 287 U.S. 206, 210 (1932); *United States* v. *Sawyer*, 213 F. Supp. 38, 40 (E.D. Pa. Jan. 11, 1963).

Had the F.B.I. been forced to rely on search by warrant, it is clear that it could not have demonstrated probable cause. Nonetheless, the record shows that the consent of petitioner's father to search of his house and seizure of petitioner's property was obtained by representing that

a search warrant could be secured if consent were not given. Petitioner's father testified on direct examination (T. 128):

> "Q. Was anything said about the use of a search warrant?
>
> "A. Yes, sir, he mentioned that, that they could get a search warrant if we didn't give them permission; he said it would help them if I would go ahead and sign the release."

On cross-examination of petitioner's father, the Commonwealth's attorney acknowledged that this representation had been made (T. 140):

> "A. I felt they, of course, could get a search warrant.
>
> "Q. They explained that to you, didn't they?
>
> "A. They explained that could be done."

The leading case in this Court dealing with the effect of misrepresentation on consent to search is *Gouled* v. *United States*, 255 U.S. 298 (1921), which held that the misrepresentation vitiated the consent and violated the fourth amendment. However, the *Gouled* case involved not only a fraudulent entry but a secretive seizure.

In *Cleary* v. *Bolger*, 371 U.S. 392 (1963), decided since the filing of the petition for certiorari herein, this Court considered a consent to search obtained by a misrepresentation substantially like the one in this case. In *Cleary*, the police represented to the person whose premises were searched that "the consent form was unnecessary since they already had enough information to warrant a search but that he might as well sign it to save them the trouble." *Id.* at 393.

See also dissent at 405, describing this procedure as "trickery." However, the Court in that decision did not have occasion to decide the question of whether the misrepresentation vitiated the consent, because the case was disposed of on other grounds.

Two lower court decisions, neither one available at the time of filing the petition for certiorari, indicate the frequency with which this point may arise and reinforce petitioner's contention that by reason of misrepresentation no valid consent to search was obtained. In *Villano* v. *United States*, 310 F. 2d 680, 681-82 (10th Cir. Nov. 5, 1962), not reported until after the petition, the court held invalid consent to search obtained by authoritarian means, including the misrepresentation that the police could validly proceed without warrant. In *Commonwealth* v. *Wright*, 31 U.S.L. WEEK 2532 (Pa. Apr. 16, 1963), the court held invalid consent of a wife to search of the apartment where she and her husband lived, where the police misrepresented that her husband had confessed and had sent them to receive contraband narcotics from the apartment.

## Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Appeals of Virginia.

Respectfully submitted,

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## Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in rule 58 of this Court.

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